

Journal of Air Law and Commerce

Volume 17 | Issue 2

Article 3

1950

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G. Nathan Calkins Jr.

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Recommended Citation

G. Nathan Calkins Jr., *Principles and Extent of Liability under the Revision of the Rome Convention Proposed by the ICAO Legal Committee*, 17 J. AIR L. & COM. 151 (1950)
<https://scholar.smu.edu/jalc/vol17/iss2/3>

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PRINCIPLES AND EXTENT OF LIABILITY UNDER THE REVISION OF THE ROME CONVENTION PROPOSED BY THE ICAO LEGAL COMMITTEE

By G. NATHAN CALKINS, JR.

Chief, International and Rules Division, Bureau of Law, Civil Aeronautics Board; Columbia, A.B., 1933; Harvard, LL.B., 1936; member New York Bar; Chairman, U.S. Delegation to Fifth Session ICAO Legal Committee, Taormina, January, 1950. *Formerly*, associated with Beekman, Bogue, Stephens and Black, attorneys at law, New York City; Lieutenant, USNR; Chairman, U.S. Delegation First Session, ICAO Legal Committee, Brussels, September 1947; Third Session, Lisbon, September 1949; U.S. Representative to *Ad Hoc* Committee on Rights in Aircraft Convention, February 1947; Member Drafting Committee on Rights in Aircraft Convention, Fourth Commission, First ICAO Assembly, Montreal, May 1947; Second ICAO Assembly, Geneva, June 1948.

ON May 29, 1933, in Rome, 38 delegates from 21 different countries sat down and signed, as the final action of the Third International Conference on Private Air Law, a treaty entitled "Convention for the Unification of Certain Rules Relating to Damage caused by Aircraft to Third Parties on the Surface." That convention has now been ratified by only six nations,¹ and owing to dissatisfaction with certain of its provisions it was modified by a protocol signed at Brussels in September of 1938.

The United States is a signatory to both the original Rome Convention and the Brussels Protocol. To date it has ratified neither. The relatively small number of countries to ratify indicates either that there is little need for such a convention or that the convention is not properly responsive to that need. Re-examination of the question appeared in order and, accordingly, at the first meeting of the Legal Committee of the International Civil Aviation Organization held in Brussels in September of 1947, the question of the further revision of the Rome Convention and Brussels Protocol was placed on the agenda of the Committee. It was referred to a permanent Subcommittee which held its first meeting in Geneva in the spring of 1948.

The study of the revision of the Rome Convention proceeded through the subcommittee stage until the Fourth Session of the Legal Committee held in Montreal in 1949. Here the matter was discussed in the full Committee. However, it was not until the Taormina meeting of the Committee held in Sicily this January that it devoted its full time and energies to the preparation and drafting of a revised text of the

¹ Belgium, Brazil, Guatemala, Italy, Roumania, Spain.

Convention. As a result of the Taormina meeting a "final draft" was adopted, and the Council has placed it on the agenda of the Fourth Session of the Assembly of the Organization for consideration this May. The objective will be to prepare a final text and to open it for signature by the various Member States of the Organization.

Whether the Taormina revision of the Rome Convention is destined to share the same fate as the initial treaty and Brussels Protocol remains to be seen. However, it is apparent that with the tremendous increase in international flying and attendant increase in risks to third persons on the surface, more interest is being shown in such a Convention. National aviation laws in many of the European countries are now in the process of revision, and the desire for uniformity on third party liability aspects of such legislation has created a strong drive for a treaty along Rome lines.² It is, therefore, probable that the European states, at least, will insist upon the drawing up and finalization of a third party liability convention.

With the foregoing in mind, it becomes evident that the United States must be prepared to take a final position on the Taormina draft. It is the purpose of this article to examine some of the problems and difficulties which are presented by that draft and to discuss the effect which the Convention would have if it were ratified by the United States in substantially its present form.

The draft convention is composed of 21 Articles (not including the formal provisions).^{2a} These are divided into six chapters, headed, respectively, Principles of Liability, Extent of Liability, Security for the Operator's Liability, Rules of Procedure and Limitation of Action, Application of the Convention, and General Provisions. Of these, the first two contain the meat of the convention, although many interesting problems are raised by the rules of procedure and the security provisions. The entire discussion of this article will deal, however, with the principles and extent of liability.

In discussing the principles of liability under the convention, it is possible to begin with almost any aspect of the problem, considering each of the other aspects in turn. I have chosen to deal with them in the following order:

- (1) What interests are protected;
- (2) Whose interests are protected;
- (3) Where are they protected;
- (4) Against what instrumentality are they protected;
- (5) Who is liable for the damage;
- (6) When is he liable for damage;
- (7) How must the damage be caused;
- (8) Defenses.

² Comments made by Andre Garnault, 5th Session, Legal Committee, final meeting.

^{2a} The full text of the Taormina draft is found on pp. 194-199 *infra*.

(1) *What interests are protected:*

The field which the Convention covers is the tort liability of aircraft operators toward third persons on the surface. Tort is, perhaps, too narrow a description, for the liability imposed by the Convention is absolute and arises irrespective of the negligence or wrongdoing of the operator. However, the draft is designed primarily to establish international rules whereby persons injured on the ground may recover against operators of aircraft for physical injury or damage to their property caused them by aircraft in flight.

(2) *Whose interests are protected:*

The Convention does not, however, extend to the liability of all aircraft operators towards all third parties on the ground. It is considerably limited on this regard in several ways. The first and most obvious limitation is that the Convention is to apply only where an aircraft registered in one contracting state causes damage to third persons on the surface of another contracting state.³ In other words, the American citizen on the ground will have no interest in this Convention except to the extent that he may be damaged by a foreign aircraft whose country of registry is a contracting state. The Convention in no way will affect his rights and obligations against domestic aircraft flying over his property or against aircraft of another country not a party to the Convention. The same observations, in reverse, apply to the operator of a United States registered aircraft. The Convention in no way will affect him or his liability for damage done in the United States. Nor will it govern his liability in the case of damage done abroad in a noncontracting state. Only where the damage is caused to the surface of another contracting state will the Convention enter into play.

(3) *Where are interests protected:*

The second exclusion from the broad coverage of the Convention is that the damage must occur on the surface. This is evident from the title itself. Consequently, all liability as between operators of aircraft in flight arising from collisions is excluded from the Convention. The term "surface" is not defined in the Convention. However, it would appear obvious that it applies both to land and water areas. There is little difficulty in extending it to include structures on the land as well. A greater question may arise with respect to damage caused below the surface such as in the case of injury to fish, or to subsurface oil or gas lands caused by the impact of an airplane on the ground.⁴ While the legislative history as to the intent of the Committee with regard to the use of this word is not very illuminating, it is believed that it must

³ Article 17.

⁴ Cases which construe the word "surface" have been for the most part disputes between owners of the surface and holders of mining rights. In such cases, which obviously would have little bearing on the problem here involved, it is held that "surface ordinarily signifies only the superficial part of the land." *Jeffrey v. Spruce-Boone Land Co.*, (W. Va.) 164 S.E. 292, 293.

be construed as covering the subsurface as well as the "superficial part of the land." Any other conclusion would be absurd.

(4) *Against what instrumentality are interests protected:*

Perhaps greater difficulty will be encountered with the word "aircraft." This term is also left undefined in the Convention. Presumably it will be read in connection with the definition of aircraft drawn up by ICAO which defines it as "any machine that can derive support in the atmosphere from the reaction of the air."⁵ While the foregoing definition would seem adequately to cover balloons, dirigibles, airplanes, helicopters, and gliders, there is some doubt as to whether it would cover rockets. A rocket such as the V-2 does not derive any support from the reaction of the air but is propelled along its trajectory by the reaction of rocket motors. It would appear wise to envisage the possibility of the development of man-carrying rockets and to cover them under the terms of the Convention in the definition of aircraft. Otherwise a potential source of damage to third persons on the surface would remain outside the scope of the Convention.

A third exclusion from the provisions of the Convention are military, customs, and police aircraft.⁶ It is to be noted that other state aircraft, even though they are the property of the sovereign, are not excluded from the provisions of the Convention, and it, therefore, must be assumed that the Convention will apply to foreign sovereigns operating such other aircraft over the territory of other contracting states.⁷ It is interesting to note that the original draftsmen of this provision intended the convention to exclude cases of privately owned aircraft being operated on behalf of the military. Operations performed by an air carrier under charter to the Air Forces would apparently therefore fall outside the Convention.⁸

The drafting of this Article raises another interesting point. The history of the Rome Conference indicates that the draftsmen intended only to exclude from the Convention damage caused by these aircraft. The Article may, however, have broader effect. For example, if a foreign civil aircraft registered in a country which is a party to the Convention should land in the United States, and prior to the end of its landing roll should crash into parked military, customs, or police aircraft, it would appear that a literal reading of Article 20 would make the Convention inapplicable to the damage caused to such aircraft. This result is highly questionable in view of the fact that any aircraft not in flight partakes of the character of an object on the surface and

⁵ "Definitions," ICAO Doc. 6180, p. 65, April, 1949.

⁶ Article 20.

⁷ Article 20 is a verbatim reproduction of Article 21 of the original Rome Convention. During the Rome conference Sir Alfred Dennis, U.K. Representative made a strong effort to have this exclusion extended to other state-operated aircraft at least in so far as certain of the provisions were concerned. On this he was decisively defeated. Draft Minutes Third International Conference on Private Air Law, May 24, page 28.

⁸ *Ibid*, page 28.

there would appear to be no reason to give such aircraft a special status. It would seem that this provision should be revised so as to exclude only the damage caused by such aircraft rather than the aircraft themselves.

Persons and Objects Falling From Plane

Not only is the damage caused by an aircraft in flight covered by the Convention, but also any damage caused by a person or thing falling from such an aircraft is equally covered. The application of this provision is obvious in those cases where engines, wheels, or propellers fall off in flight. Its application in the case of circumstances similar to the recent tragic occurrence aboard a Pan American aircraft over Long Island, where the steward was blown out the aircraft door, is also obvious.

A more usual case would undoubtedly occur where the pilot or other occupant descends by parachute. In the latter event, the Convention brings about a somewhat extraordinary result in that the extent of the liability is determined by the relative weight of the aircraft, not by the weight of the person or thing falling therefrom. It is obvious that a man making a parachute drop from a Piper cub would cause no more nor no less damage than a person descending in like manner from a Stratocruiser. However, in the first case the damage caused is limited with respect to absolute liability to about \$16,000; whereas, in the second case, the absolute liability ceiling would be in the neighborhood of \$400,000. In this connection, a further ambiguity is presented. There is no indication as to whether the limitation of liability will apply separately to each individual or thing falling from the aircraft or whether it covers the totality of the persons or things falling therefrom.

A further area of doubt raised by this provision is its application to crop-dusting, weed-killing, and similar operations. Admittedly, in most countries commercial activities in the nature of crop-dusting are reserved to national aircraft, and, consequently, the Convention would have little applicability in most of the cases of this type. However, it may well arise that such activity will be permitted foreign aircraft by some countries. In such cases would the damage caused by the drifting to a neighbor's land of insecticides and fungicides from the land over which they were sprayed constitute a cause of action against the operator under the Convention's terms? Under its present language I do not believe it would apply, since the chemical will have completed its "fall" from the aircraft before it is moved by the wind to the adjoining landowner's lot. Obviously, if the foreign pilot mistakenly dusts the wrong land, he would be held under the provisions of the Convention.

Another question which may occur to sportsmen is the question of whether damage caused inadvertently by firearms used in aircraft is

covered under the Convention. The practice of hunting coyotes from aircraft is fairly widespread in the western part of the United States. It is conceivable that a Canadian aircraft might engage in similar activity over United States territory and by inadvertence kill a domestic animal, or injure a human being. Literally speaking, it is doubtful that the Convention should apply in such a case, since the bullet does not fall from the aircraft. Moreover, the instrumentality causing the damage is not rendered more dangerous by the fact that it is in an aircraft.

Irrespective of the logic of not bringing liability of this type within the rules of the Convention, it is apparent that the delegates to the 1933 Rome Conference regarded damage caused by airborne firearms to be within the scope of the treaty.⁹ In this regard the Taormina draft retains the original wording. It should be noted, however, that the operator is excused if the damage was caused intentionally by the person aboard, and he can show that he could not have prevented it.¹⁰

(5) *Who is liable for the damage?*

Article 2 of the Convention deals with the persons who are to be held liable for the damage of the kind covered by the Convention. Paragraph 1 of Article 2 places the liability for compensation on the aircraft operator. The term "operator" is in turn defined in paragraph 2 of the Article, but because of the complexity and vagueness of the definition, it is not always certain who the operator will be. In some cases the wrong person is made operator, and in at least one case there is no operator at all. The definition is broad and will obviously cover not only air carriers, charter operators, and other commercial people but all private owners and any other person who flies or operates an aircraft. The definition reads as follows:

"For the purposes of this Convention the term 'operator' shall mean the person who either personally or through his servants is in lawful possession of the aircraft, uses it for his own account and navigates it in flight."

it will be observed immediately that there are three elements to this definition — there must be (1) lawful possession, (2) use for one's own account, and (3) navigation in flight. The term "lawful possession" as used in the definition will undoubtedly give rise to a great many difficulties in applying the English text.

It has been variously defined as meaning "actual possession" obtained in a lawful manner,"^{10a} "possession with the consent or acquiescence of the owner,"^{10b} or "possession under color of title."^{10c} It is

⁹ Speech by Mr. Engstroemer (Sweden) Minutes, Third International Conference on Private Air Law, May 19, page 6.

¹⁰ Article 3(1).

^{10a} *Laclede Land & Improvement Co. v. Epwright*, 265 Mo. 210, 177 S. W. 386, 387.

^{10b} *Rapp v. Mabbett Motor Car Co.*, 201 App. Div. 283, 194 N. Y. S. 200, 203.

^{10c} *Byrd v. Hall*, 227 F. 537, 546 (CCA, Mo.).

obvious that none of the foregoing definitions would be appropriate to cases arising under the convention. The first definition would permit a bailee who unlawfully retains the aircraft to be considered in lawful possession. Under the second, an innocent bailee from a thief would not be in lawful possession. Under the third, there would have to be some color of title to the aircraft itself. Such definitions are obviously of little help. Perhaps the courts would arrive at what is believed was intended — that the immediate possession was obtained in a lawful manner and there has been no act on the part of the possessor coupled with *mens rea* to deprive the owner of the aircraft.

However, if the question of “unlawfulness” is considered from the standpoint of civil liability, further confusion is added. It has been held that the bailee of a horse converts it if he drives it farther than the agreement provided or even in a different direction.¹¹ With respect to the bailor, the bailee’s possession is held to be unlawful. If such a doctrine were extended to the aeronautical field, many private pilots might unwittingly make themselves liable without limitation as an unlawful user merely by flying in an unauthorized direction.

It is believed that use of terms of art such as “lawful possession” in the English text is at best unfortunate and will undoubtedly lead to the varied application of the convention as between common law countries and countries under civil codes.

Apart from the difficulties which the use of words of art may entail in the definition, there is at least one type of case where the definition puts the wrong person in as operator. For example, in Australia it is the practice for the government-sponsored airline, British Commonwealth Pacific Airlines, at times to lease aircraft from other carriers together with crew to fly the airplane over the designated routes of the Commonwealth company. It would appear obvious that the Commonwealth company should be regarded and held liable as operator of the aircraft if the aircraft should cause damage in the United States. However, under the Convention definition, the local Australian company would be the operator since it would be in lawful possession of the aircraft, would be using it for its own account, and would be navigating it in flight. It is easily seen how readily this possibility could be used as a device by a large operator to limit his liability below that contemplated in the Convention: He could cause each of his aircraft to be separately incorporated, the corporations having no other assets, and have them flown by the servants of the individual companies. Under the terms of the definition the liability would attach not to the true operator but to each one of the individual corporations. Such devices are not unknown to the law, as certain New York tugboat companies have separately incorporated their tugs for many years. A similar practice

¹¹ *Ray v. Tubbs* (1878) 50 Vt. 688.

among English shipowners was adverted to by Sir Alfred Dennis during the original Rome Conference.¹²

Relieving Aircraft Rental Agencies

The definition would also have the effect of relieving from liability operators of aircraft rental agencies. If a pilot should hire a Piper Cub for half an hour at the Wayne County Airport to fly across into Canada and should crash and cause damage in that country, under the definition there is no doubt that the pilot, not the owner of the aircraft, would be regarded as the operator. It is believed that this result is economically unsound. The pilot who hires an airplane for a short period of time generally takes it at a fixed cost per hour which he understands includes the gasoline and oil, and customarily believes that all necessary precautions have been taken to make the aircraft airworthy.

It is frequently impracticable if not impossible for him to obtain insurance for the specific aircraft for the flight in question. On the other hand, it is quite simple for the operator of a fleet of small aircraft which he rents by the hour to carry insurance on those aircraft. In the United States generally the operators of the more reputable flying schools carry insurance, including third party liability insurance, to protect their students and the itinerant pilots who may hire their aircraft. It is believed that this point must be considered when the definition again is discussed at Montreal.

Aside from the foregoing difficulties with the definition, there is at least one instance in which nobody would be the operator if it is literally applied. If an owner leases an aircraft to one who intends to operate it and the latter in turn has the aircraft stolen from his possession by an unlawful user, the unlawful user would not be the operator because he is not in lawful possession of the aircraft. The lessee is no longer the operator because he neither navigates the aircraft in flight, uses it for his own account, or is in actual possession. This is also true of the owner. This defect in the drafting of the definition leads to the highly inequitable result of making the owner liable under Article 2 (3) since there is no way in which he can prove that somebody else is the operator. To avoid such a result, owners who desire to lease their aircraft will be forced to register them in the name of a "dummy," which would thwart the basic purpose of the owner liability provision.

Article 2 (3), referred to above, has an additional disadvantage in that it makes no distinction between security owners and beneficial owners. Presumably, in the large majority of cases, the beneficial owner will be the registered owner. However, there may be certain instances, under American law particularly, where a security owner is listed as the registered owner of the aircraft.

¹² Minutes, Third International Conference on Private Air Law, May 19, page 26.

In one respect, however, the definition is good. There is no exception made in respect of sovereign states. This fact, coupled with the failure to exclude state aircraft other than military, customs, and police aircraft, mentioned above, leads to the conclusion that foreign sovereigns will be covered by the Convention. Consequently, if the Convention should come into force with the definition as it is now written, a contracting state itself operating its national air carrier would be amenable to suit under the Convention in another contracting state where damage has been caused. The problem of sovereign immunity is a vexatious one, and is essentially unjust in cases where aircraft are operated as a commercial enterprise. This provision in the Convention, it is believed, will effectively overcome the difficulties involved in the existing doctrine permitting such immunity.

Article 2 (3) places the liability upon the owner in those cases where he cannot show some other person to be the true operator. It is to be noted that liability is not placed on him in his capacity as owner. The provision merely establishes a presumption that he in fact was the operator, which he may rebut. There is one important qualification to the right of rebuttal — the true operator must be joined in the proceedings before the owner can make this showing. This qualification was strenuously objected to by the English-speaking delegates to the Taormina conference. The objection was based in large part on the possible difficulties of obtaining service on the operator in a foreign jurisdiction. Apparently the Continental attitude toward substituted service — which is permitted under civil law in a far greater number of cases than in common law jurisdictions — influenced the majority to accept the provision. Thus, for the owner to escape liability under the draft, he must not only point out the true operator, but bring him into the particular court.

It is difficult to determine how the owner who leases his aircraft can protect himself against this provision. A clause in the lease similar to a confession of judgment might be a workable solution, although it is probable that new and radical legislation would have to be enacted to permit this to be done before U.S. courts.

(6) *When is the operator liable for damage:*

Even though the operator is held absolutely liable for damage caused in most instances, there are cases where harm caused by his aircraft will not be covered by the convention, but will be left for local law to determine.

As indicated above, the damage must be caused by an aircraft *in flight*. An aircraft is considered to be in flight under the convention "from the moment when power is applied for the purpose of actual take-off until the moment when the landing roll ends."¹³ Although this definition is slightly out of focus when considered in connection

¹³ Article 1 (2).

with flights of free balloons, it is believed that this defect is not a grave one, and that a normal judge would have little difficulty in determining in accordance with the theory of the definition when a balloon is actually in flight. Apart from this minor difficulty the definition is considered entirely workable, and one which appropriately fixes the period of liability under the Convention.

(7) *How must the damage be caused:*

It will, of course, be noted that not all damage caused by an aircraft is covered by the Convention. Article 1, paragraph 1 restricts the application of the Convention to instances where the damage has been caused through contact, fire, or explosion. Thus, there is eliminated from the application of the convention, damage arising from aircraft operations in the nature of a nuisance, damage caused by the slipstream of a propeller, and damage caused as a result of extraordinary noise. The rules for handling these cases are left to the local law. The Convention attempts to specify the manner in which the cause of the damage is to be related to that damage.

The provisions of Article 1 (1) which attempt to limit the type of damage for which the foreign operator is to be held responsible deserve particularly careful consideration. It will be noted that the draft contains no test of foreseeability for determining whether the particular damage is too remote. The link which connects the action to the harm is not specified either as to length or unexpected twists, but only as to nature.

The first of these elements to be considered is contact. Does this mean contact with the aircraft or may it merely be contact with some other object which has been set in motion by an activity of the aircraft? The exact extent of the meaning of this term was not discussed thoroughly at Taormina. However, it is highly probable that the draftsmen did not intend that contact with the aircraft itself must be the immediate cause of the damage. Such a result would be to give the Convention too narrow a scope. It is, consequently, believed that if a foreign aircraft in flight crashes into a house, and the house in turn falls down and injures a passerby in the street, the passerby would be covered by the Convention. A more difficult case would arise in the event that an airplane covered by the Convention crashed into a high tension power line depriving an entire city of power. Would the patient on the operating table in the local hospital have a right of action against the aircraft operator by reason of the fact that the surgeon's knife slipped when the lights were extinguished? Would it extend to the electrocution of a rescuer who contacts the live ends of the broken power line?

There was some discussion at Taormina which would indicate that the case where the surgeon's knife slipped was intended to be covered. Yet it is difficult to distinguish this case on principles of causation from the case of a workman on the airport whose eye is put out by dust

blown in his face by an airplane taking off. However, as indicated above, a rule which would confine the extent of liability to actual contact with the airplane would probably be considered too narrow and would be rejected.

On the other hand, if the word "contact" is construed as meaning only that the damage must be caused by the impact of some object, whether connected with the aircraft or not, so long as the impact is in fact brought about by an aircraft in flight, the scope of the Convention becomes far too broad. Not only would the case of the surgeon's knife be covered, but many other results, not in the minds of the draftsmen, would be brought about. The shattering of windows caused by a low-flying airplane, through propeller vibration, would be actionable under this theory if the shattering glass inflicted injury. Such damage was considered too remote to include under the terms of the Convention.

Perhaps the best and most logical construction of the term would be to require that every link in the chain of causation be either contact, fire, or explosion. In this way, the passerby injured by the falling house would be covered; the patient on the operating table would not.

What about the would-be rescuer who is electrocuted by the fallen high-tension cable? It may be asserted that the damage arose, not because of the contact, but because of the high voltage. In other words, it is not contact damage but electric damage that brings the harm about. But if this rule were followed, the foreign operator might find himself liable without limitation if he knocked the wires down negligently,¹⁴ for the cause of action would be governed by local law.

With respect to fire, the same considerations apply as in the case of contact. It would certainly be too narrow a construction to say that the only damage covered by the Convention in regard to fire is to be only that part of the fire which is attributable to the burning of the aircraft itself. Obviously, if the aircraft starts a conflagration which in turn spreads to adjoining houses, the fire which does the damage is not fire from the aircraft.¹⁵ The aircraft, however, is the moving cause. Similarly, in the case of explosion. This term cannot mean explosion of the aircraft alone, but must include explosions of materials on the ground such as gasoline tanks, gas storage reservoirs and the like caused by the aircraft's impact with them.

Possible Effect of Divergent Rules

The difficulty here is not merely theoretical. The aircraft operator is bound to lose by any divergence between the rules of causation estab-

¹⁴ See *Wagner v. International R. Co.* (1921), 232 N. Y. 176, holding per Cardozo, J., that defendant railroad was liable for injuries caused a rescuer going to the aid of another passenger negligently let off a train on a trestle.

¹⁵ At common law a defendant starting a fire is held liable in many jurisdictions, even if the cause of the plaintiff's damage is the joint action of the fire started by defendant and a fire started by another. *Anderson v. Minn., St. P. Ry. Co.* (1920), 146 Minn. 430.

lished by the Convention and the rules of proximate cause as determined by the courts. If the convention prescribes a rule which makes the operator liable for damage which under judge-made law is considered too remote, he loses by having to pay where he otherwise would not. And if the Convention chops off the liability therein prescribed short of the damage which the law of negligence allows as proximate, he may be sued for negligence without limitation of his liability.

The solution to this problem is certainly not a simple one. The difficulty arises primarily, it is believed, because of the incompatibility between the causal rules of negligence and those of absolute liability. Writers on the law of torts fix the limits (not limitations) of liability for negligence through two main tests: (a) was defendant's act of a class which subjected the plaintiff to an unreasonable risk, and (b) did the harm happen in such a manner as to make the defendant liable.¹⁶ Both these aspects have been treated by the courts as a problem of proximate cause. Both serve primarily as tests which limit the defendant's duty of due care.

In the case of absolute liability, however, there is liability without duty. The plaintiff does not have to show that he is one of a class toward whom the defendant owed a duty of care. All that need be shown so far as "class" is concerned is that he was injured on the surface by the defendant's aircraft in flight. Thus the aerial counterpart of the *Palsgraf* case¹⁷ would be determined in favor of the plaintiff. In that case the plaintiff was injured while standing on defendant's station platform by the fall of a set of platform scales. The scales had fallen as a result of an explosion of materials in another passenger's suitcase some distance away, when the defendant's guard negligently tried to assist the other passenger. The court held that with respect to the plaintiff, defendant had not been negligent. Similarly, the aerial counterpart of *Wood v. Pennsylvania R. R. Co.*,¹⁸ where a woman standing on the station platform was injured by the dead body of a man negligently run over by the defendant's train at a nearby railroad crossing, would result in liability to the aircraft operator although the railroad was held not liable.

In both the foregoing cases the holding for the defendant was predicated not on the unforeseeability of the result, but on the fact that defendant had not been negligent with respect to the plaintiff. In the absolute liability contemplated by the Taormina draft no such limitation can be imposed, for the duty of the carrier is proclaimed by the Convention as extending to "any person who suffers damage on the surface."

With respect to the second element referred to above, which is used as a basis for limiting the extent of liability for negligence, the Taor-

¹⁶ See *Harper on Torts*, 1933, §73.

¹⁷ *Palsgraf v. Long Island Ry. Co.*, 248 N. Y. 339 (1928).

¹⁸ 177 Pa. 306 (1896).

mina draft substitutes a conventional rule for the common law test of foreseeability. The general rule for determining negligence is that a "defendant must have acted or failed to act in such a way that an ordinary reasonable man would have realized that certain interests of certain persons were unreasonably subjected to a general but definite class of risk."¹⁹ The conventional rule, on the other hand, ignores foreseeability and substitutes "through contact, fire, or explosion."

The net result appears to be that the doctrine of remoteness has no application to damage under the convention and that the aircraft operator will be liable for all harms for which his conduct is the cause in fact.

Raising the Ceiling of Liability

So far only the absolute liability of the aircraft operator has been discussed. Article 9 of the draft, however, imposes liability up to three times the amount provided for the absolute liability ceiling "if the person suffering the damage proves that the damage was caused through negligence or any wrongful act of [the] operator or his servants." The causal link "through negligence" seems inadvertently to have been substituted for "contact, fire, or explosion." This provision was intended merely to raise the ceiling of liability where the absolute limits are insufficient to cover the damage and negligence on the part of the operator is proved. However, it may establish a completely alternative cause of action under the convention which might grant recovery where no absolute liability is involved.

If we assume that the chain of causation for absolute liability must be composed entirely of these three elements, certain very anomalous situations will result. One illustration will suffice to point up the difficulty.

Let us suppose, for example, that air carrier A is negligent in maintaining its aircraft and that its pilot is in the process of taking off at night from a foreign airport. In the course of the take-off run, the airplane throws a propeller blade, owing to a defect in the blade which could easily have been discovered had proper inspection been made. The propeller blade arcs up and falls through the roof of the airport paintshop, where it strikes a spark and ignites the vapors there present. The fire spreads to an adjoining hangar in which blasting powder is kept by the airport manager in violation of a city ordinance. The blasting powder explodes causing a dentist in a building down the street to damage a singer's throat with his dental drill. All aircraft in the hangar are destroyed, either by fire or explosion, and a would-be rescuer is overcome by CO₂ from the fire extinguishers.

Under the above set of facts, liability of the air carrier would be absolute under the terms of the Convention for the damage caused the paintshop, the other aircraft which were destroyed, and for the singer's

¹⁹ *Harper on Torts*, 1933, §111 at page 259.

throat, since there is no limitations on remoteness of cause under the rule of absolute liability. On the other hand, there would be no absolute liability toward the rescuer because his damage did not occur through contact, fire, or explosion. There would, however, be liability for negligence under Article 9, under ordinary rules of proximate cause. There would be no liability under either doctrine toward the airport operator for the destruction of his hangar, in view of his contributory negligence in maintaining dynamite in a location prohibited by a city ordinance. It is likely under the doctrine of the *Palsgraf* case, the carrier would be liable to the owners of the individual airplanes stored in the hangar because they were probably within the orbit of required care. However, this would not be true with respect to the injured singer's throat.

Thus, it would appear that there would be absolute liability toward the owners of the aircraft, the proprietor of the paintshop, and the singer. There would be liability for negligence to the owner of the paintshop and the rescuer and probably to the owners of the aircraft stored in the hangar. There would be no liability for negligence with regard to the singer.

The foregoing illustrates the difficulties with which common law countries are confronted when it is necessary to deal with absolute liability of the nature proposed by the Convention. The common law rule of strict liability as exemplified in *Fletcher v. Rylands*²⁰ does not present the same difficulties, it is submitted. Just as liability for negligence is limited by the doctrine of foreseeability, so is common law strict liability limited by the rule that the damage must result by reason of the particular quality that made the instrumentality dangerous.

Thus, the rule in *Fletcher v. Rylands*, although imposing liability without fault upon a property owner maintaining an artificial body of water on his premises for the escape of those waters, nevertheless, does not impose liability if the waters escape through the wrongful act of a third person²¹ or an act of God.²² In similar fashion the owner of a non-domestic animal such as an elephant is held strictly liable for damage which it may do to other people. However, it has been held in the case of the owner of the elephant that he is not liable when a horse shied as a result of seeing the beast coming down the street.^{22a} In other words, in those cases, the damage had to arise by reason of the risk against which absolute liability was imposed.

(8) Defenses.

In the case of the Rome Convention, the defenses of act of God and unlawful act of a third person generally are not available. If causal

²⁰ 1866 L. R. 1 Ex. 265.

²¹ *Box v. Jubb* (1879) L. R. 4 Ex. D. 76.

²² *Nicholls v. Marsland* (1875) L. R. 2 Ex. D. 1.

^{22a} *Scribner v. Kelley*. 38 Barb. (N. Y.) 14 (1862).

connection can be shown between the damage and an aircraft in flight which damage arises through contact, fire, or explosion, the operator is held to be liable. There are, however, three minor defenses.

The first and most important of these is negligence or other wrongful act on the part of the complainant.²³ Two observations can be made with respect to this provision. The first is that it is not a mandatory rule which must be applied in all cases. The court has the option of holding that negligence of the plaintiff is a complete defense, of permitting partial recovery on the basis of comparative negligence, or of allowing complete recovery. In this last connection, it should be noted that ordinarily negligence of the plaintiff is not a bar to a recovery based on strict liability.²⁴

There will, however, be occasions where this defense may properly be used. Possibly the most frequent of these will arise in connection with damage done to airport property where either the traffic controller is negligent or there has been negligence in maintaining the airport. In the suppositious case above cited, the airport operator was negligent in maintaining a supply of dynamite in contravention of the city ordinance, since the very reason for which the ordinance was enacted was to prevent occurrences of this general nature. In rarer instances, a person on the ground may also be guilty of contributory negligence such as by walking on the runway, showing false lights, etc.

A further way in which contributory negligence may come about is through operation of military, customs, or police aircraft. Even though this type of aircraft is excluded from the provisions of the Convention and even though the Convention itself does not apply to other aircraft in flight, it is, nevertheless, believed that if a military aircraft negligently collides with a foreign air carrier aircraft on take-off, with resultant damage to the airport property, it is probable that where the government operates both the airport and the military aircraft it would be unable to recover for the damages inflicted on the airport surface.

The second defense available to the aircraft operator is in the case of the use of the aircraft by a third person. This may arise in two ways. If a third person unlawfully uses an aircraft belonging to an operator and the operator can show that he took proper measures to prevent the unlawful use or that it was impossible for him to do so, damage caused by the aircraft while being operated by the unlawful user does not impose liability upon the true operator. In similar fashion, if the operator has been deprived of the use of his aircraft by an act of public authority or as a consequence of armed conflict or of civil disturbance, neither he nor the owner shall be liable for damage caused, or by any person or thing falling therefrom.

²³ Article 4.

²⁴ Cf. Blackburn, J., in *Fletcher v. Rylands*, *supra*; *Muller v. McKesson*, 73 N. Y. 195 (1818).

The last defense available to an operator against the rule of absolute liability is contained in Article 3, paragraph 1, which frees him from liability if he can show that the damage was caused by an act committed intentionally by some person on board, not a member of the crew, when the act has no connection with the operation of the aircraft and could not, with proper care, have been prevented by him or his servants. This would certainly cover the case of a person who carries a time bomb in the aircraft with intent to blow it up. However, it would apparently not cover a person who overpowers the crew and dives the airplane into the ground or into a house. In the last-named event, it is perfectly apparent that the act has a connection with the operation of the aircraft.

None of the foregoing defenses are important from the point of view of the operator in view of the rarity with which they will occur.

With respect to the operator's liability for negligence under Article 9 of the Convention, which makes him liable up to three times the extent of his absolute liability if negligence can be proved, there are additional partial defenses. It will be noted that this article limits and curtails the doctrine of *respondeat superior* in that the operator may be excused from liability if he proves that he has taken proper measures to prevent the accident or that it was impossible for him to do so. Moreover, the provision eliminates any possibility of the application of the doctrine of *res ipsa loquitur*.

Limitation of Liability

Up to the present time the discussion in this article has been predicated primarily upon the basis of liability of the operator and possible defenses. From the point of view of the lawyer these provisions are possibly the most interesting because they impose novel requirements and a novel system of law on one which has been in the process of development for several hundred years. However, from the economic point of view the most important provisions in the Convention relate to those which limit the liability of the operator. It is obvious that any limitation of liability has potentialities of hurting some person or class of persons. A great catastrophe may entail such tremendous damage that millions of dollars are lost. The extent of the damage may well exceed any reasonable limitation of liability which might be devised. Consequently, it may be asserted that from the point of view of the injured person any limitation on his right to recovery may possibly be prejudicial.

However, the limitation of an aircraft operator's liability cannot be judged on the basis of possible prejudice alone. Its validity must be determined on whether that prejudice is undue. If the limitation of liability stands to benefit an important segment of the population and does not jeopardize the overwhelming majority of our citizens, the public interest may require its imposition. Limitations of liability are well

known and approved by our law. Entirely apart from the limits contained in many wrongful death statutes,²⁵ the corporation and limited partnership are well-known and publicly accepted institutions whereby liability is limited.

Nor do existing rules of negligence by any means guarantee the plaintiff a full recovery. If the "defendant must take his plaintiff as he finds him," so must the plaintiff take the defendant, and it is obvious that not all defendants are equally solvent. A large amount of damage may be done by a destitute operator. In that case, although the right to recovery may be unlimited, the amount of actual money obtained in damages would be exceedingly small. To state this point would seem to state the obvious. Yet it is one that is frequently overlooked in the justification of a limitation of liability.

As a result of the foregoing situation at the present time a person on the surface injured by a well-run, regular and well-to-do air carrier would be protected except in the case of the most calamitous catastrophe. Such operators, particularly the U.S. operators, have been very conservative in the amount of insurance coverage which they have obtained, the average amount running in excess of \$2,000,000 in the case of our foreign flying lines. Regular foreign carriers, perhaps, have not been quite so meticulous in carrying extensive insurance, but what they do carry is probably adequate for average risks. However, other operators, perhaps operating on an irregular basis, may come into the country without insurance, flying aircraft in which the shaky financial condition of the company is reflected in the maintenance of the aircraft. The assets of such a company may be far lower than possible limitations of liability under the Convention.

It is believed that an international limitation of liability can do much to cure a possible lack of financial responsibility on the part of the international operators. The already responsible operators will have definite knowledge of what risks they should insure and to what extent. The smaller operator will be encouraged to insure his liability risks if he has the certainty that no accident which can arise will knock him out of business. Otherwise, he may be tempted to take the chance of not insuring on the ground that the partial protection now afforded by insurance is not worth its cost. Lastly, a uniform international limitation of liability will enable the individual countries to impose compulsory insurance requirements on foreign operators, within the limitations of liability, without fear of retaliatory or conflicting action on the part of other countries. At the present time countries may be reluctant to require foreign operators to insure, because any meaningful requirement along these lines might lead to even more stringent requirements by the foreign countries.

As a result of the foregoing, it is believed that a proper and sound limitation of liability, far from being unduly prejudicial to the average

²⁵ Sixteen states have limits of liability for wrongful death varying from \$5,000 to \$20,000.

person who is injured by a foreign aircraft, will actually point the way towards a greater likelihood of recovery.

The question, however, remains as to what a proper limitation of liability is. Prior to the Taormina meeting, the United States position in this regard was that for aircraft under 12,500 pounds the limitation of liability should be in the neighborhood of \$150,000. In the case of aircraft over that weight the limitation of liability should be in the neighborhood of \$1,500,000. These figures were both to be predicated upon negligence as a basis for liability. The Taormina draft provides, with respect to aircraft weighing 12,500 pounds, that the limit for absolute liability shall be in the neighborhood of \$40,000, with a three-fold increase in case of proved negligence. Similarly, in the case of aircraft weighing more than 125,000 pounds, the limitation of liability is \$400,000 for absolute liability and \$1,200,000 for liability in the event of proved negligence.

In the case of these two weight classes the divergence from the initial United States position does not appear to be too drastic. It is true that a greater burden is placed upon the prospective claimant in case his claim exceeds the amount of absolute liability than would have been the case had the United States position been adopted. Under the Taormina draft he must affirmatively prove that the carrier was negligent if he is to recover more than the amount of the absolute liability.

Although this requirement undoubtedly imposes an additional burden on the claimant, it is one which can be unduly exaggerated. In the case of the Warsaw Convention, a reversal of the burden of proof is of vital necessity in cases where the aircraft disappears at sea or in other instances where the wreckage cannot be located. In the case of Rome-type damage however, the tangible evidences of the crash will obviously be apparent, and even though an aircraft may be gutted by fire and all persons aboard killed, there will be much circumstantial evidence as to the cause of the accident. In this connection it is interesting to note that the Civil Aeronautics Board in its accident investigation work since January 1, 1947, has been unable to establish the probable cause of the accident (where wreckage has been located) only in six cases out of 74 on which hearings have been held.

On the other hand, it must be recognized that the Taormina draft is even more beneficent toward the average injured person than the United States position. The average damage caused will in all likelihood fall within the range of absolute liability where negligence need neither be proved nor an asserted absence of negligence rebutted. Consequently it is believed that on the average and with respect to aircraft weighing 12,500 pounds and 125,000 pounds, respectively, the Taormina draft does not unduly depart from what was urged in the United States position.

With respect to the aircraft below these respective weight limitations however, it is probable that the liability limited by the Taormina

formula may be too low. In the case of the DC-3, the absolute liability is in the neighborhood of \$80,000, of the DC-4, in the neighborhood of \$250,000. Both these limitations, of course, would be tripled if negligence is proved.

CONCLUSION

The Taormina draft of the revision to the Rome Convention contains a great number of points which have not been touched on here. Some of the difficulties raised by certain provisions of the draft are dealt with elsewhere in this issue. Limitations of time and space have precluded a further discussion of the other points, on which positions must be reached by the United States prior to the May meeting of the ICAO Assembly.

On the whole it is believed that a convention along the lines of the Taormina draft will be beneficial both to air commerce and people on the ground.

The draft will need no little revision to take care of the difficulties discussed in this article, and to indicate plainly that the liability under the Convention is in substitution of existing rules of liability affecting the operator and owner, and not merely an additional right given to the injured third person. It will also be necessary to deal in some manner with the liability of the crew, since at the present time, there is no limitation of liability of which the crew can take advantage. If these problems can be ironed out at Montreal it is believed that the resulting convention will be a good one.